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No. 15-1262

In the
# Supreme Court of the United States

PATRICK MCCRORY, in his capacity as Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, and A. GRANT WHITNEY, JR., in his capacity as Chairman of the North Carolina State Board of Elections,

*Appellants*,

v.

DAVID HARRIS AND CHRISTINE BOWSER,

*Appellees*.

**On Appeal from the United States District Court for the Middle District of North Carolina**

## BRIEF FOR APPELLANTS

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## QUESTION PRESENTED

In 2011, the North Carolina General Assembly drew a new congressional redistricting map to ensure that North Carolina's congressional districts would comply with the one-person, one-vote requirement in the wake of the 2010 census. Shortly thereafter, several organizations brought suit in state court challenging two of those districts as unconstitutional racial gerrymanders. The state court rejected their claims in full, concluding that the General Assembly drew one district based on political, not racial, considerations, and that it drew the other in a manner narrowly tailored to achieve the State's compelling interest in complying with the Voting Rights Act. Dissatisfied with that result, two members of one of the plaintiff organizations brought this suit challenging the same two districts on the same grounds. The parties even submitted the state court record in full. Without even acknowledging the direct conflict with the state court case that its decision produced, the district court reached precisely the opposite conclusion.

The question presented is:

Whether the First and Twelfth Districts of North Carolina's 2011 congressional redistricting plan are unconstitutional racial gerrymanders.

## PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

David Harris and Christine Bowser

Defendants:

Patrick McCrory, in his capacity as Governor of North Carolina; North Carolina State Board of Elections; A. Grant Whitney, Jr., in his capacity as Chairman of the North Carolina State Board of Elections

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## OPINION BELOW

The opinion of the Middle District of North Carolina is reported at 159 F. Supp. 3d 600 and reproduced at JS.App.1-90.

## JURISDICTION

The three-judge district court issued its judgment on February 5, 2016. This Court has jurisdiction under 28 U.S.C. §1253.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause and the relevant provisions of the Voting Rights Act are reproduced at App.1-6.

## STATEMENT OF THE CASE

This Court is no stranger to the two North Carolina congressional districts at issue here. The same two districts have produced four Supreme Court decisions, and indeed have produced much of the Court's racial gerrymandering doctrine. As the record in this case amply demonstrates, the most recent iteration of each district reflects a good-faith effort by the North Carolina General Assembly to redistrict following the 2010 census without becoming "trapped between the competing hazards of liability" under the Voting Rights Act (VRA) and under the Equal Protection Clause. *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion). Indeed, all three judges on the district court panel below were at pains to make clear that they did not doubt the good faith of the General Assembly in drawing the two districts' lines. Moreover, the state courts exhaustively considered identical challenges to these same two districts and

concluded that each fully complied with the Constitution. The federal court's subsequent conclusion that the State engaged in unconstitutional racial gerrymandering as to both districts is legally and factually unsustainable.

### A. Legal Background

The Constitution requires States to draw their federal congressional districts "as nearly as is practicable" to equality in population. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). Accordingly, each decennial census inevitably requires States to reapportion those districts to adjust for population shifts and ensure continued equality. But each decennial census does not inevitably require divisive allegations of racial gerrymandering or contentious litigation over the rejiggered district lines. To the contrary, this Court has emphasized that redistricting is principally the responsibility of state legislatures, the role for litigation is limited, and the need for judicial deference to the difficult judgments of state legislatures is acute. *Vera*, 517 U.S. at 978; *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

States traditionally have pursued several goals when performing this complex task, including "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation." *Ala. Legislative Black Caucus v. Alabama* (*ALBC*), 135 S. Ct. 1257, 1270 (2015). Although compliance with those traditional principles is not constitutionally compelled, *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973), and deference to the difficult line-drawing judgments of state legislatures remains

critical, *Vera*, 517 U.S. at 978, excessive deviation from traditional principles may give rise to a claim of unconstitutional gerrymandering.

While this Court has not identified "judicially discernible and manageable standards" for adjudicating *partisan* gerrymandering claims, *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion), it has recognized and established standards to govern *racial* gerrymandering claims—*i.e.*, claims that voters were assigned to districts on the basis of race. In *Shaw v. Reno* (*Shaw I*), 509 U.S. 630 (1993), the Court recognized a "racial gerrymandering" cause of action under the Fourteenth Amendment, holding that, like other race-based classifications, race-based redistricting must satisfy strict scrutiny. *Id.* at 657. The Court has emphasized, however, that "application of these principles to electoral districting is a most delicate task." *Miller*, 515 U.S. at 905.

Courts must be sensitive to the reality that "the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw I*, 509 U.S. at 646. "That sort of race consciousness does not lead inevitably to impermissible race discrimination." *Id.* Nor does it suffice to require the application of strict scrutiny. Instead, challengers must surmount a difficult burden before strict scrutiny is triggered: Districting legislation "warrants strict scrutiny only if it can be proved that the law was motivated by a racial purpose or object, or if it is unexplainable on grounds other than race." *Hunt v. Cromartie* (*Cromartie I*), 526 U.S. 541, 546 (1999) (citation omitted).

Racial gerrymandering doctrine is substantially complicated by the reality that the Voting Rights Act has been interpreted to sometimes *require* States to prioritize race when drawing its districts. For example, Section 2 of the VRA may require a State to create and maintain a "majority-minority" district if: (1) a minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the group is "politically cohesive"; and (3) the majority votes "as a bloc." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *see also, e.g., Voinovich v. Quilter*, 507 U.S. 146, 154 (1993). And under Section 5, a covered jurisdiction (which several North Carolina counties were when the challenged districts were drawn[1]) cannot draw its districts in a way that would lead to "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

Accordingly, in addition to holding that strict scrutiny applies only when race was the "dominant and controlling" factor in the legislature's decision "to place a significant number of voters within or without a particular district," *ALBC*, 135 S. Ct. at 1264, this Court also has accepted the premise that strict scrutiny is satisfied if the legislature had "good reasons" or a "strong basis in evidence" to believe that its consideration of race was required by the VRA, *id.* at 1274; *see also, e.g., Abrams v. Johnson*, 521 U.S. 74,

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[1] In *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), this Court held that the coverage formula in Section 4(b) of the VRA could no longer be used to require preclearance under Section 5. *Id.* at 2631.

91 (1997); *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 915 (1996). That premise avoids leaving States "trapped" between their competing federal law obligations, *Vera*, 517 U.S. at 977, condemned for "unconstitutional racial gerrymandering should [they] place a few too many minority voters in a district," but condemned under the VRA should they "place a few too few," *ALBC*, 135 S. Ct. at 1274.

### B. Factual Background

#### 1. The History of CD1 and CD12

The two districts at issue here demonstrate the difficulties legislatures face in discharging their important and inherently political responsibilities in drawing districting lines to ensure population equality while complying with the varying demands of the VRA and the Fourteenth Amendment. Indeed, this case marks the fifth occasion on which this Court has considered racial gerrymandering challenges to North Carolina's First and/or Twelfth Districts.

The first of those cases, *Shaw I*, arose out of the State's redistricting following the 1990 census. 509 U.S. at 633. As a result of population growth, North Carolina had been awarded a 12th seat in the U.S. House of Representatives, and its General Assembly—then controlled by the Democratic Party—enacted a redistricting plan that included one majority-black congressional district. *Id.* After the U.S. Department of Justice (DOJ) objected to the plan under Section 5 of the VRA, the General Assembly passed new legislation creating a second majority-black district. *Id.* The two majority-black districts that resulted were CD1 and CD12.

In *Shaw I*, individual North Carolina voters alleged that CD1 and CD12 were the products of unconstitutional racial gerrymanders, as evidenced by their "dramatically irregular shape." *Id.* The Court agreed that the plaintiffs stated a viable constitutional claim by alleging that the design of each district was "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race." *Id.* at 658. Accordingly, the Court remanded for determination of whether, "[i]f the allegation of racial gerrymandering remain[ed] uncontradicted," the use of race was "narrowly tailored to further a compelling governmental interest." *Id.*

On remand, the three-judge district court ruled that although the districting plan classified voters on the basis of race, it was narrowly tailored to serve the State's compelling interest in complying with the VRA. In *Shaw II*, this Court reversed again, holding that (1) the plaintiffs lacked standing to challenge CD1 because none of them lived in that district; and (2) the creation of CD12 as a second majority-minority district was not required by the VRA. 517 U.S. at 899.

The General Assembly went back to the drawing board and enacted a new congressional districting plan in 1997, with CD1 as the sole majority-minority district. Although CD12 retained its highly unusual shape, it was substantially smaller in area, split fewer county lines, and was no longer a majority-minority district (though African-Americans still comprised "approximately 47% of the district's total population [and] 43% of its voting age population"). *Cromartie I*, 526 U.S. at 544. DOJ precleared the plan, but voters

once again filed suit alleging that CD12 was the product of an unconstitutional racial gerrymander. *Id.* at 541. The three-judge district court granted summary judgment for the plaintiffs, but this Court reversed, finding summary judgment inappropriate because the record supported the State's claim that the district's strange shape was the product of a permissible partisan, rather than an impermissible racial, gerrymander. *Id.* at 551. The evidence that politics predominated over race was so strong that Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, wrote separately to suggest that *the State* may have been entitled to summary judgment. *Id.* at 558 (Stevens, J., concurring in the judgment).

After a three-day trial, the three-judge district court again held that CD12 was an unconstitutional racial gerrymander. *Easley v. Cromartie* (*Cromartie II*), 532 U.S. 234 (2001). This Court reversed once again, holding that the district court clearly erred in finding that "race *rather than* politics *predominantly* explains District 12's 1997 boundaries." *Id.* at 243.

North Carolina's population continued to grow, and after the 2000 census, the State was awarded a 13th seat in the House. Thus, by necessity, the General Assembly again returned to the contentious task of redrawing the State's congressional district maps. The Democratic-controlled legislature drew the new CD13 "in a similar manner to District 12, connecting strong Democratic sections of three metropolitan areas ... through a less populous corridor along the northern border." JA1140, 2692-93. When the maps were drawn, the black voting-age population

was 47.76% in CD1 and 42.31% in CD12. JA503.[2] The 2001 maps were not the subject of any VRA litigation, JS.App.9,[3] and they were used for the next decade.

### 2. The 2011 Redistricting Process

North Carolina's population continued to grow over the following decade, but with greater growth in certain parts of the State. Thus, after the 2010 decennial census, the General Assembly once again needed to adjust the State's congressional districts. In the 2010 election, the Republican Party gained control of both houses of the General Assembly. Thus, when the House and Senate established redistricting committees, two Republicans—Senator Rucho and Representative Lewis—were named Chairmen of the Senate and House Redistricting Committees. JS.App.9. Each committee was responsible for recommending a plan for its own chamber, and the two committees were jointly responsible for preparing a congressional plan. JS.App.9. The committees were cognizant of their obligation to pre-clear the plans with DOJ, as well as their broader obligations to comply with the Constitution and the VRA.

As part of their efforts to ensure VRA compliance, the Chairmen arranged for public hearings to receive evidence regarding whether voting in North Carolina remains racially polarized. That evidence confirmed that racially polarized voting continues in North

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[2] Using 2010 census data, the black voting-age populations in the benchmark plan's CD1 and CD12 were 48.63% and 43.77%, respectively. JA873.

[3] North Carolina's 2003 *state* legislative redistricting plan was the subject of *Bartlett v. Strickland*, 556 U.S. 1 (2009).

Carolina. For example, Anita Earls, speaking on behalf of the Southern Coalition of Social Justice (SCSJ), testified that North Carolina continues to "have very high levels of [racially] polarized voting in the state." JA880. Dozens of other individuals, including members of the North Carolina State Conference of the NAACP, also testified about the continued presence of racially polarized voting and the continued need for a majority-minority district. *See* JA1990-91, 2066-71. Earls also provided the General Assembly with an expert report prepared by Dr. Ray Block, who found a "consistent relationship between the race of a voter and the way in which s/he votes," JA960, and she concluded that this and other "data demonstrates the continued need for majority-minority districts." JA886.

The General Assembly also retained its own expert, Dr. Thomas Brunell, who reviewed and agreed with Dr. Block's findings and also conducted his own analysis focusing on polarization at the county level. He found "statistically significant racially polarized voting in 50 of the 51 counties" he studied, which included all the counties located in CD1, as well as most of the adjacent counties. JA973. Dr. Block's and Dr. Brunell's findings were not disputed at any time during the legislative process.

Chairmen Rucho and Lewis hired Dr. Thomas Hofeller to design and draw the 2011 congressional plan. JS.App.10. Dr. Hofeller drew the 2011 plan using software called "Maptitude," which allowed him to overlay demographic and political data atop a map of the State's precincts. JA2696-97. The Chairmen were the sole sources of instruction for Dr. Hofeller

regarding the design and construction of the congressional maps. JS.App.10. According to Dr. Hofeller, they instructed him that his first priority should be complying with the one-person, one-vote requirement. JA2681. That task would pose a particular challenge with respect to CD1, which the 2010 census revealed had become underpopulated by 97,563 persons, JA2690, by far the most in the State, JA872. Dr. Hofeller's second priority, as instructed by the Republican Chairmen, was to "draw maps that were more favorable to Republican candidates." JA2682. In particular, he was instructed "to weaken Democratic strength in Districts 7, 8, and 11 ... by concentrating Democratic voting strength in Districts 1, 4 and 12." JA1139.

With respect to CD12, Dr. Hofeller's "instructions ... were to treat the 12th District exactly as it had been treated by the Democrats in 1997 and 2001 as a political draw." JA2682-83. The Chairmen instructed him to make CD12 "a stronger Democratic district" in the manner "most advantageous to the surrounding districts" for Republican candidates—in other words, to add Democratic voters to CD12 to help Republican candidates in the surrounding districts. JA2754. Following those instructions, Dr. Hofeller used an overlay with the results of the 2008 Presidential election, which was the "sole thematic display or numeric display on the screen except for ... the population of the precinct." JA2721. Using that data, Dr. Hofeller added precincts that strongly supported President Obama, and removed precincts that showed greater support for Senator McCain. For example, he removed the "strong Democratic areas of Greensboro" from CD6 "in order to make that district more

Republican," and moved those areas into CD12. JA2735. To ensure that CD12's total population was unaffected, he then moved portions of Forsyth County from CD12 to the solidly Republican CD5, which "could take those Democratic precincts" without endangering the Republican incumbent. JA2753. Dr. Hofeller did not "receive any instructions about the racial percentage to include in the 12th District," JA2686, and he did not "refer to any racial information" in drawing the district, JA2702.

Dr. Hofeller's instructions regarding CD1 were different. Because CD1 "was considered by the chairs to be a voting rights district," Dr. Hofeller was told to draw CD1 "with a black voting-age population in excess of 50 percent," particularly in light of "the *Strickland* case." JA2684. Accordingly, as he added the requisite 97,500 people to re-establish population equality, he made sure to satisfy both "the political policy goals of the General Assembly" and the need for at least a "50 percent black voting-age population." JA2691, 2802. That said, "there were no limits" on what the exact racial composition should be, allowing Dr. Hofeller to "consider[] many other factors" and to choose from among the "many ways that that district could have been drawn." JA2802-03.

In July 2011, Chairmen Rucho and Lewis released their first proposed congressional map, known as Rucho-Lewis Congress 1. In their joint public statement accompanying the release, they explained that the existing 2001 congressional map could not be retained because of population shifts, but that it was used "as a frame of reference for re-drawing new congressional districts." JA354. With respect to

CD12, they candidly explained that they had drawn the district "with the intention of making it a very strong Democratic District," and had "accommodated Congressman Watt's preference by agreeing to model the new Twelfth District after the current Twelfth District." JA357-58. They also noted that one of the counties in CD12 (Guilford County) was covered by Section 5 of the VRA, but expressed confidence that the plan would be precleared as nonretrogressive because they had "drawn [the] proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District." JA358.

As for CD1, Chairmen Rucho and Lewis explained that the 2001 version was "substantially under-populated by over 97,500 people." JA355. They also noted that CD1 "was originally drawn in 1992 as a majority black district ... to comply with Section 2 of the [VRA]," and that this Court's decision in *Strickland* requires districts drawn to comply with Section 2 to have a "true majority black voting age population." JA355. They explained that they were able to solve both issues by "adding population from Wake County" into CD1, which they believed accorded with the wishes of Congressman G.K. Butterfield, who had long represented CD1. JA356. The addition of Wake County "brought the First District into compliance with 'one person, one vote'" and, "[b]ecause African Americans represent a high percentage of the population added to the First District from Wake County," made CD1 a majority-minority district. JA356.

After holding a public hearing and receiving feedback from colleagues, congressional incumbents, and voters, the Chairmen released a modified plan, known as Rucho-Lewis Congress 2. Their joint statement explained that they had "made several changes in this second proposed Congressional plan based upon comments received during the public hearings, comments on the General Assembly's website and feedback from members of Congress." JA362. The most significant change was to replace Wake County in the new CD1 with parts of Durham County. JA365. As the statement explained, Congressman Butterfield denied having a preference for Wake County in CD1. Accordingly, the change accommodated his position while satisfying the equal population requirement and maintaining CD1 as a majority-minority district. *Id.*

After making only minor changes to Rucho-Lewis Congress 2, the General Assembly passed the 2011 Congressional Plan (Rucho-Lewis Congress 3) on July 28, 2011. JS.App.13. In the final plan, CD1's black voting-age population was 52.65%, and CD12's was 50.66%. JA1154. The General Assembly submitted the plan to DOJ, which precleared it on November 1, 2011. JS.App.13-14. The plan was implemented in time for the 2012 election. As expected, Congressmen Butterfield and Watt prevailed by large margins in CD1 and CD12. Republican candidates took over previously Democratic seats in CD8, CD11, and CD13.

### 3. Initial State Court Litigation

Shortly after DOJ precleared the 2011 congressional plan, two sets of plaintiffs, one of which included the North Carolina NAACP, challenged the

plan in state court, alleging that CD1 and CD12 were the products of racial gerrymanders.[4] JS.App.14. After a two-day bench trial, the trial court rejected all of their claims in a 74-page opinion supported by a 171-page appendix with detailed findings of fact. JA1969-2161.

With respect to CD12, the court found that race did not predominate in the drawing of the district's lines. JS.App.14. Instead, the court found that the General Assembly's predominant motives were: "(1) creating the 2011 Twelfth District as an even stronger Democratic district ...; and (2) by doing so, making districts that adjoin the Twelfth Congressional District more competitive for Republicans." JA2149. With respect to CD1, the court found that the General Assembly had a strong basis in evidence to conclude that drawing CD1 as a majority-minority district was reasonably necessary to protect the State from liability under the VRA, and that the district was narrowly tailored to serve that compelling interest. JA1991-92, 2018.

The plaintiffs appealed, and the North Carolina Supreme Court affirmed. *Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014). The plaintiffs petitioned this Court for a writ of certiorari, and the Court granted, vacated, and remanded in light of *ALBC*. *See Dickson v. Rucho*, 135 S. Ct. 1843 (2015). After further briefing and oral argument, the North Carolina Supreme Court affirmed once again. *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015). Plaintiffs' petition for a writ

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[4] The state-court plaintiffs also challenged CD4 and several of the 2011 state legislative districts on various grounds.

of certiorari from that decision is pending. *Dickson v. Rucho*, No. 16-24.

### 4. Federal Court Litigation

After the state trial court issued its decision rejecting racial gerrymandering challenges to CD1 and CD12, Appellees, two members of the North Carolina NAACP, filed this case in the District Court for the Middle District of North Carolina. Like the plaintiffs in *Dickson*, they alleged that both CD1 and CD12 are the products of unconstitutional racial gerrymanders. JS.App.15. Because Appellees challenged "the constitutionality of the apportionment of congressional districts," 28 U.S.C. §2284(a), a three-judge court was convened. JS.App.16.

Demonstrating the overlap between the state and federal court cases, the parties jointly moved to admit the state court record in the federal court action. The three-judge court then held a three-day bench trial, during which it heard testimony from seven witnesses, including Dr. Hofeller; Congressman Watt, who formerly represented CD12; Congressman Butterfield, who represents CD1; and two experts for the plaintiffs, Doctors Peterson and Ansolabehere. JS.App.16. In a divided decision, the court found both districts unconstitutional. JS.App.56. The court held that the legislature intentionally drew CD1 with a "floor" of "50-percent-plus-one-person," and that "traditional districting criteria were considered ... solely insofar as they did not interfere with" that floor. JS.App.20. The court then applied strict scrutiny and held that "CD 1 was not narrowly tailored to achieve compliance with the VRA." JS.App.46.

As for CD12, the court acknowledged (with considerable understatement) that the evidence of racial predominance was "not as robust as in CD 1." JS.App.30. However, the court nonetheless rejected the State's argument "that politics was the ultimate goal," expressing concern that "[t]o accept the defendants' explanation" would "create a 'magic words' test that would put an end to these types of challenges." JS.App.43-44.

Although he "fully concur[red] with Judge Gregory's majority opinion," Judge Cogburn wrote separately to "express [his] concerns about how ... redistricting through *political* gerrymander ... has become the tool of choice for state legislatures in drawing congressional boundaries." JS.App.58 (emphasis added). Judge Cogburn acknowledged that "[r]edistricting through political gerrymandering is nothing new," but lamented that "modern computer mapping allows ... political mapmakers" to more easily accomplish it. JS.App.59-60.

Judge Osteen dissented in part. Although he agreed with the majority that CD1 did not satisfy strict scrutiny, he "emphasize[d] that the evidence does not suggest a flagrant violation. Instead, the legislature's redistricting efforts reflect the difficult exercise in judgment necessary to comply with" the VRA. JS.App.62. As for CD12, Judge Osteen would have held that Appellees "failed to show that race was the predominant factor in the drawing of CD 12." JS.App.90. As he explained, Appellees "put forth less, and weaker, direct evidence showing that race was the *primary* motivating factor in the creation of CD 12, and none that shows that it predominated *over* other

factors." JS.App.78. Accordingly, in his view, they failed to meet the "demanding" burden that this Court's precedents impose. JS.App.89.

## SUMMARY OF ARGUMENT

The record in this case is manifestly insufficient to satisfy Appellees' demanding burden of proving that either of the challenged districts was the product of unconstitutional racial gerrymandering. Indeed, the first court to consider this case—on a nearly identical record—found that CD12 was drawn based on politics, not race, and that CD1 was permissibly drawn as a majority-minority district in a good-faith effort to comply with the VRA. Those findings by a co-equal state court should have barred this case at the outset, but at a minimum they reinforce that the federal court's subsequent contrary conclusions are neither factually nor legally sustainable.

As to CD12, race plainly did not predominate, and this Court's previous decision in *Cromartie II*, involving essentially the same congressional district, is controlling. As in *Cromartie II*, the record overwhelmingly confirms that CD12 was drawn based on political considerations. The General Assembly's goal was to take a district that was already a strong Democratic district thanks to the politically motivated line drawing approved in *Cromartie II* and make it an even stronger Democratic district, to the benefit of Republican candidates in the surrounding districts. Not only did the Chairmen of the redistricting committees candidly admit as much when they introduced the plan; it is undisputed that the consultant who prepared the plan did not even look at racial demographics when drawing CD12. Instead,

the *only* data he considered in determining which areas to move in and out of CD12 were political data from the 2008 Presidential election. Simply put, race cannot plausibly have been the predominant factor when the principal architect of the district did not even look at racial demographics when drawing it. The bare fact that the legislature's political strategy produced a district with a black voting-age population of 50.66% is manifestly insufficient to satisfy Appellees' demanding burden of proving otherwise.

Nor was race the predominant factor in the drawing of CD1. To be sure, unlike with CD12, there is no dispute that CD1 was intentionally drawn as a majority-minority district. But that alone is not enough to satisfy Appellees' burden of proving that race predominated, and the district court's contrary conclusion was plainly wrong as a matter of law. Even if strict scrutiny applied to CD1, moreover, it would readily be satisfied, as the State clearly had the requisite "good reasons" and "substantial basis in evidence" for concluding that CD1 must be drawn as a majority-minority district to avoid liability under the VRA. CD1 had to be substantially altered during the 2011 redistricting because it was underpopulated by nearly 100,000 people. And blindly adding voters from the majority-white surrounding counties would have posed a serious risk of VRA liability given the overwhelming evidence of polarized voting, and the fact that the minority candidate of choice had won his most recent election by fewer than 33,000 votes with a black voting-age population of 48.63% and a black registered-voter percentage of 50.66%. The State thus undoubtedly had valid reasons to conclude that CD1 must be drawn as a majority-minority district. The

district court's contrary conclusion would put States in precisely the untenable position that this Court has sought time and again to avoid: "trapped between the competing hazards of liability" under the VRA and the Constitution. *Vera*, 517 U.S. at 977.

## ARGUMENT

### I. The State Court Litigation Rejecting The Very Same Claims Raised Here Should Have Barred This Case.

In our federalist system, comity demands respect for state court adjudications of federal law claims. That constitutional imperative should have ended this follow-on federal lawsuit at the outset. At a bare minimum, the prior rejection of these same claims by the state courts should have fundamentally shaped the district court's review and should impact this Court's review.

Before this case was filed, a three-judge panel of the North Carolina state trial court had already decided every relevant legal and factual issue. *See Dickson v. Rucho*, Nos. 11 CVS 16896 and 11 CVS 16940 (N.C. Super. Ct. July 8, 2013), JA1969-2161. In *Dickson*, the North Carolina NAACP brought racial gerrymandering claims identical to those at issue here, with its standing premised on alleged harm to its members. The trial court considered the same evidence presented in this case—indeed, the parties here stipulated to the admission of the entire state court record—and it rejected the plaintiffs' claims in full. Applying the same standards that governed the decision below, the state court found that the General Assembly's predominant motive in drawing CD12 was political, and it found that the General Assembly had

a strong basis in evidence for believing CD1 must be drawn as a majority-minority district. JS.App.14. The North Carolina Supreme Court has since affirmed that decision twice. JS.App.15.

The *Dickson* decision should have foreclosed this federal case as a matter of claim preclusion and collateral estoppel. Under the doctrine of claim preclusion, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). And "[u]nder collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case" or its privies. *Id.* Where the first court to resolve a claim was a state court, these doctrines "not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Id.* at 95-96.

There is no question that *Dickson* involved the same claims and issues as this case and was litigated to final judgment before this suit was even filed. Nor should there be any serious question about privity: Both Appellees here concede that they are members of the plaintiff organization in *Dickson*, and multiple courts have recognized that members of "an organization ... may be bound by the judgment won or lost by their organization," so long as the organization adequately represented their interests and no due process violation results. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 322 F.3d 1064, 1082

(9th Cir. 2003) (emphasis omitted); *see also Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation*, 975 F.2d 683, 688-89 (10th Cir. 1992); *NAACP v. Hunt*, 891 F.2d 1555, 1561 (11th Cir. 1990).

The rule precluding members of an organization from relitigating an adverse judgment is acutely important in the redistricting context. First, it prevents redistricting litigation from taking on "the aura of the gaming table," with an unsuccessful organization trying its luck over and over with different plaintiffs until it obtains a favorable result. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971). The risk of such repetitive litigation is heightened here because the underlying right plaintiffs seek to vindicate is shared by the public at large, creating a nearly limitless number of potential plaintiffs and lawsuits. *See United States v. Hays*, 515 U.S. 737, 744-45 (1995) ("Where a plaintiff resides in a racially gerrymandered district ... the plaintiff ... has standing to challenge the legislature's action."). And because every plaintiff would seek the same relief—invalidation of the State's districting plan—the success of one member would redound to the benefit of all, including plaintiffs who had previously litigated and lost.

Second, these generally applicable principles are strongly reinforced by principles of federalism and comity. When a state court has considered all the evidence and issued a measured judgment that the state legislature complied with the law, allowing plaintiffs another bite at the apple in federal court disrespects the sovereignty of a State engaged in a core sovereign function. *Miller*, 515 U.S. at 915

("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions."). The potential interference with sovereignty and dignity interests is especially strong because, absent preclusion, the State is put in a heads-you-win-tails-I-lose position. There is no question that an adverse state court ruling would bind the State and benefit all potential plaintiffs. Thus, if an unsuccessful state court challenge is nothing more than a trial run, the State is placed in a no-win situation that will all but guarantee not one, but two, constitutional challenges each time a map is redrawn.

The federal intrusion is particularly pronounced where, as here, the federal court takes issue not with the state court's understanding of federal law, but with its factual findings about the motivations of state officials. Letting plaintiffs try their lawsuit a second time not only allows them to circumvent the clear error standard of review that otherwise would apply to the state court's findings, but also works a separate federalism injury by allowing a federal court to apply *de novo* review to the factual findings of a co-equal court. At a bare minimum, the district court should have granted some measure of deference to the directly on-point findings of the state court. And yet, the district court never even acknowledged the square conflict with *Dickson* that its decision created, let alone attempted to explain how it made flatly contrary factual findings on a nearly identical record.

Even if this federal suit is not precluded as a matter of law, the fact that the same claims were already tried to final judgment in state court bears directly on this Court's standard of review. *Cf.*

*Cromartie II*, 532 U.S. at 242-43. No matter which way the Court comes out, it will effectively hold that either the state court's or the federal court's factual findings were clearly erroneous. It is nothing more than happenstance (and the direct appeal procedure that governs federal, but not state, redistricting claims) that the federal judgment is the one currently under review. In fact, the state judgment arrived here first, only to be vacated and remanded in light of *ALBC* before being reaffirmed by the North Carolina Supreme Court. *See Dickson v. Rucho*, 781 S.E.2d 404, 412 (N.C. 2015), *petition for cert. filed* (U.S. Jun 30, 2016) (No. 16-24). Thus, principles of both federalism and fairness call for a careful review of the record below, with cognizance that the first court to consider the evidence concluded that North Carolina complied with federal law in all respects.

## II. Congressional District 12 Is Not The Product Of An Impermissible Racial Gerrymander.

A sense of déjà vu should be palpable. As to CD12, this is *Cromartie II* all over again, with only the interests of the political parties reversed. In *Cromartie II*, this Court held that the plaintiffs failed to prove that "race *rather than* politics *predominantly* explain[ed] District 12's 1997 boundaries," and it reversed the district court's contrary holding as clearly erroneous. 532 U.S. at 243, 258. The district court made the same mistake here.

Indeed, this case follows *a fortiori* from *Cromartie II* because the role of partisan political factors was highlighted by the change in political control of the legislature. In 1997, the Democrats controlled the General Assembly and consciously drew CD12 to

capture as many Democratic-leaning precincts as possible, in hopes of creating a safe Democratic district. In 2011, the Republicans controlled the General Assembly and decided to turn the Democrats' plan against them, drawing additional Democratic-leaning precincts into CD12 in hopes of making the surrounding districts more competitive for Republicans. Thus, the redrawing of CD12 was, if anything, more obviously politically motivated the second time around. And judged in political terms, it was a success, as the surrounding districts in fact voted in Republicans. In short, the roles may have reversed relative to *Cromartie II*, but the General Assembly's goal remained the same: to draw CD12 to maximize political opportunities for the party in power. The district court concluded otherwise only by committing the same clear errors that led this Court to reverse in *Cromartie II*.

### A. Racial Gerrymandering Claims Are Subject to a Demanding Burden of Proof.

"Federal court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. Moreover, both "federalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions." *Id.* at 934-35 (Ginsburg, J., dissenting). Accordingly, plaintiffs challenging a legislative map as a racial gerrymander must shoulder an appropriately demanding initial burden: Districting legislation "warrants strict scrutiny only if it can be proved that the law was motivated by a racial purpose or object, or if it is

unexplainable on grounds other than race." *Cromartie I*, 526 U.S. at 546 (citations omitted).

Given "the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments," courts must exercise "extraordinary caution" before concluding "that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916. Under the "demanding" burden of proof that this Court's cases establish, *Cromartie II*, 532 U.S. at 241, a court may reach that conclusion only when the plaintiff proves that race was the "dominant and controlling" factor in drawing the challenged district—in other words, that the legislature actually "subordinated traditional race-neutral districting principles ... to racial considerations." *Miller*, 515 U.S. at 916.

In undertaking that "most delicate" inquiry, *id.* at 905, courts must be mindful that "the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw I*, 509 U.S. at 646. "That sort of race consciousness does not" suffice to trigger strict scrutiny. *Id.* Likewise, the mere fact that district lines correlate with race does not, in and of itself, prove that race was the "dominant and controlling" factor in the decision "to place a significant number of voters within or without a particular district." *ALBC*, 135 S. Ct. at 1264. After all, many race-neutral reasons could lead to the same result.

Most obviously, because race often is "highly correlated with political affiliation," political

districting considerations often will lead to racially correlated districting lines. *Cromartie II*, 532 U.S. at 243. For instance, "a legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts." *Id.* at 245. If that alone were enough to violate the Constitution, then the Equal Protection Clause would be at war with itself, as it would *force* States to subordinate traditional districting criteria to race. Accordingly, this Court has held that "[i]f district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify." *Vera*, 517 U.S. at 968; *see also Cromartie I*, 526 U.S. at 551 ("[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact.").

*Cromartie II* provides a uniquely apt example. There, the plaintiffs attempted to prove that CD12—the same district at issue here—was racially gerrymandered by pointing to the district's irregular shape, lack of compactness, and division of counties; an expert report showing that for each divided county, the proportion of black voters was higher inside CD12 than outside it; and a handful of statements by legislators that referenced race. 532 U.S. at 243-45, 253-54. The district court in *Cromartie II* deemed that evidence sufficient to prove unconstitutional racial gerrymandering, but this Court found clear error and reversed, holding that the plaintiffs had "not successfully shown that race, rather than politics, predominantly accounts for the result." *Id.* at 257. In

reaching that conclusion, the Court emphasized that "race must not simply have been *a* motivation ... but the *predominant* factor motivating the legislature's districting decision." *Id.* at 241. "Given the undisputed evidence that racial identification is highly correlated with political affiliation in North Carolina," the Court found evidence of "the district's shape, its splitting of towns and counties, and its high African-American voting population" insufficient "as a matter of law" to satisfy that "demanding" standard. *Id.* at 243, 257.

The Court also provided a clear directive as to how plaintiffs should seek to prove that race predominated over political factors in future cases:

> In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.

*Id.* at 258. As that requirement reflects, when race and voting behavior are closely correlated, plaintiffs must do more than show that race is a *possible* explanation for a district's lines. They must prove that race was the "dominant and controlling" factor, *Miller*,

515 U.S. at 913, subordinating political and other traditional districting criteria alike.

### B. Appellants Submitted Overwhelming Evidence that CD12 Was the Product of Politics, Not Race.

A careful review of the record below confirms that plaintiffs failed to satisfy the demanding burden necessary to sustain a finding "that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916. Although the burden was on the plaintiffs, Appellants presented overwhelming evidence that politics, not race, predominated in the drawing of CD12's district lines—and, indeed, in the drawing of the entire 2011 Congressional Plan.

"Historically, the North Carolina Legislature has been dominated by Democrats who wielded the gerrymander exceptionally well." JS.App.60 (Cogburn, J., concurring). Accordingly, when Republicans won a majority in both houses of the General Assembly, they decided to try to reverse the partisan effects of decades of Democratic gerrymandering. Instead of trying to "unpack" Democratic voters from Districts 1, 4, and 12, however, Republicans decided to further concentrate Democratic voters in those districts, thereby weakening Democratic strength in Districts 2, 7, 8, 9, and 11. JA1139. In addition, they planned to "completely revamp District 13, converting it into a competitive GOP district." *Id.*

To that end, Chairmen Rucho and Lewis specifically instructed Dr. Hofeller "to treat District 12 as a political district and to draw it using political data and to draw it in such a manner that it favorably

adjusted all of the surrounding districts." JA2696; *see also* JA2149 (*Dickson* findings). And Dr. Hofeller followed those instructions to a tee. Indeed, at no time did Dr. Hofeller even "refer to any racial information" in drawing CD12. JA2702; *see also* JA2150 (*Dickson* findings). Instead, using an overlay with the results of the 2008 Presidential election as the "sole" display on the screen besides each precinct's total population, JA2721, he moved precincts in and out of CD12 "to accomplish the political goals in the surrounding districts," JA2697. As he explained: "It really wasn't ... totally about the 12th District. It was about what effect it was having on the surrounding districts." *Id.* And as the *Dickson* court found, "[t]he principal differences between the 2001 version of [CD12] and the 2011 version is that the 2011 version adds more strong Democratic voters ... and removes Republican voters." JA2149.

Chairmen Rucho and Lewis' public statements likewise confirm that CD12 was drawn with politics in mind. Although they understandably downplayed the partisan impact of the new plan in an attempt to garner bipartisan support, they acknowledged that, "[by] continuing to maintain [CD12] as a very strong Democratic district, we understand that districts adjoining the Twelfth District will be more competitive for Republican candidates." JA366; *see also* JA2150-51 (*Dickson* findings). Moreover, while Chairmen Rucho and Lewis openly described *CD1* "as a majority black district ... established by the State to comply with Section 2 of the Voting Rights Act," they specifically contrasted that with CD12, which "was created with the intention of making it a very strong Democratic District." JA355, 357.

The results of the 2012 election—the first under the new plan—underscored the political motivations in the redrawing of CD12 and the surrounding districts. Republicans turned a 7-6 Democratic advantage into a 9-4 Republican advantage—a majority that included four of the five districts that they designed the 2011 plan to make more competitive.[5] That trend continued in 2014, when Republicans added the fifth district, CD7, to their ledger.[6]

In sum, the very same district this Court upheld in *Cromartie II* as a politically motivated attempt to make "a safe Democratic seat" was adjusted at the margins to make it an even safer Democratic seat. As the *Dickson* court explained, that made the surrounding districts "more competitive for Republican candidates as compared to the 2001 versions of these districts." JA2150-51. And electoral success followed. JA1139. Thus, using the Democratic version of CD12 as a guide, the Republican-controlled General Assembly successfully doubled down on the political considerations that this Court recognized as legitimate in *Cromartie II*. A more clear-cut case of "district lines ... drawn on the basis of political affiliation" is difficult to imagine. *Vera*, 517 U.S. at 968. Accordingly, "there is no racial classification to justify." *Id.*

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[5] Official Results, North Carolina State Board of Elections, http://bit.ly/2c2r23X (last visited Sept. 11, 2016).

[6] Official General Election Results-Statewide, North Carolina State Board of Elections, http://bit.ly/2cwl6FV (last visited Sept. 11, 2016).

### C. Appellees' Evidence Was Manifestly Insufficient to Satisfy Their Burden of Proving Racial Predominance.

The evidence relied upon by the majority below was woefully inadequate to support its contrary conclusion. Indeed, every piece of evidence that the district court invoked was of a piece with the evidence found unavailing in *Cromartie II*, and either perfectly consistent with the legislature's political objectives or far too equivocal to move the needle.

#### 1. Appellees failed to abide by the alternative-map requirement.

At the outset, the district court's decision should be reversed for the simple reason that the court failed to hold Appellees to this Court's command that "the party attacking the legislatively drawn boundaries *must* show *at the least* that the legislature could have achieved its legitimate political objectives in alternative ways that ... would have brought about significantly greater racial balance." *Cromartie II*, 532 U.S. at 258 (emphasis added). The reason for this requirement is simple: If plaintiffs cannot produce an alternative plan that achieves the legislature's *political* objectives while improving racial balance, then both motivations remain equally likely, and plaintiffs have not satisfied their demanding burden of proof. Moreover, if the legislature's political goals could be accomplished only by the district the legislature actually drew, then any racial considerations in its collective conscience did not actually impact the final districts.

Notwithstanding this Court's clear instruction, the district court neither required Appellees to satisfy

the alternative-map requirement nor faulted them for failing to try. Instead, it excused them from the requirement entirely, reasoning that when *Cromartie II* referred to "a case such as this one," 532 U.S. at 258, what it actually meant was "a case in which '[t]he evidence taken together ... [did] not show that racial considerations predominated.'" JS.App.43 (alterations in original). Setting aside the fact that that describes this case perfectly, that blatantly ignores the second half of this Court's sentence (which likewise describes this case perfectly): A plaintiff must supply an alternative map in "a case such as this one *where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation.*" *Cromartie II*, 532 U.S. at 258 (emphasis added).

Worse still, the district court's reasoning renders the alternative-map requirement nonsensical, as there would be no point in asking plaintiffs to submit a competing map showing that district lines could have been drawn without allowing racial considerations to predominate if the court has already concluded that "'[t]he evidence taken together ... [did] not show that racial considerations predominated.'" JS.App.43. After all, that there may have been more than one way to achieve the legislature's ends without allowing racial considerations to predominate hardly suffices to cast constitutional doubt on whichever of those ways the legislature chose. The point of the alternative-map requirement is not to confirm the obvious, but to help ensure that courts do not mistake evidence of racial *correlation* in districting lines for

evidence of racial *motivation*—which is precisely what the district court did here.

### 2. The public statements the district court invoked say nothing about the General Assembly's motives.

Even setting aside Appellees' (and the district court's) failure to abide by *Cromartie II*'s alternative-map requirement, the record is manifestly insufficient to support a finding that "race *rather than* politics *predominantly* explains District 12's ... boundaries." *Cromartie II*, 532 U.S. at 243. Indeed, the very first piece of evidence the district court identified to support its racial predominance finding reveals just how weak Appellees' case truly is. The court's headlining piece of evidence was a public statement in which Chairmen Rucho and Lewis said:

> In creating new majority African American districts, we are obligated to follow ... the decisions by the North Carolina Supreme Court and the United States Supreme Court ... Thus, in constructing VRA majority black districts, the Chairs recommend that, where possible, these districts be drawn at a level equal to at least 50% plus one "BVAP."

JS.App.30-31 (emphasis added by district court); *see* JA1025. According to the district court, the statement's use of the plural word "districts" when elucidating the relevant legal principles was compelling evidence that the Chairmen must have set out to create *two* majority-minority districts, not just the one (CD1) that they openly acknowledged intentionally creating. JS.App.31.

That contention would be dubious enough—particularly given the "extraordinary caution" that courts must exercise before concluding "that a State has drawn district lines on the basis of race," *Miller*, 515 U.S. at 916—even if the Chairmen were referring expressly and exclusively to the congressional maps.[7] But the district court's emphasis on the plural is utterly doomed by reading the statement in the broader context from which it was plucked, which confirms that the statement was referring to *neither* CD1 *nor* CD12; the entire eight-page document instead refers exclusively to the *state legislative districts* that the General Assembly was contemporaneously preparing. Indeed, the whole—and sole—purpose of the notice was to announce a public hearing on "the 2011 *State* Senate and *State* House redistricting plans." JA1024 (emphasis added). The use of the plural "districts" thus refers not to CD12 or CD1, but to the "24 majority African American House districts and 10 majority African American Senate districts" in the *state* legislative redistricting plan. JA1026. The best evidence the district court could find is thus patently irrelevant.

The two other public statements by the Chairmen that the district court discussed at least have the

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[7] Indeed, both Congress and the courts have warned against making a hobgoblin of the use of the plural versus the singular in *statutes*, which surely receive much more careful drafting attention than press statements. *See, e.g.*, 1 U.S.C. §1 ("[W]ords importing the plural include the singular."); *N. Ill. Serv. Co. v. Perez*, 820 F.3d 868, 870 (7th Cir. 2016) ("[D]rafters can use either the singular or the plural knowing that judges will treat each as including the other 'unless the context indicates otherwise.'").

virtue of actually referring to the 2011 Congressional Plan. But neither remotely supports a conclusion that race predominated over politics. The first is simply a statement in which the Chairmen attempted to dismiss criticisms of excessive partisanship as "overblown." JS.App.39; *see* JA362-63. Needless to say, a public-facing statement made by legislators seeking to quell partisan opposition to their redistricting plan says very little about the legislators' predominant motives in drawing the plan—and absolutely nothing about what role race did or did not play. The Democratic legislators in *Cromartie II* did not blare their partisan motivations from the rooftops, but that did not stop this Court from recognizing that political, rather than racial, motivations predominated. The reality is that there are perfectly understandable partisan and political motivations for downplaying partisan and political motivations. Such realities may make the electorate cynical, but they do not make a legislature racially motivated.[8]

The district court also made much of a statement expressing confidence that the presence of Guilford County, a district covered by Section 5 at the time, in CD12 would not pose a retrogression problem because "we have dr wn our proposed Twelfth District at a black voting ge level that is above the percentage of black voting age population found in the current

[8] The district court also cited an e-mail, sent to Chairmen Rucho and Lewis by outside counsel while this statement was being drafted, suggesting that the statement emphasize that in 11 of the 13 districts, more voters were registered as Democrats than as Republicans. JS.App.40; *see* JA260. For the same reasons that the statement itself says nothing about racial predominance, this e-mail adds nothing to the analysis.

Twelfth District." JA358. But that statement describes the *results* of the redistricting, not the motivation behind it; the motivation was discussed two paragraphs earlier, where Chairmen Rucho and Lewis explained that CD12 "was created with the intention of making it a very strong Democratic District." JA357. Surely if the goal were to create a majority-minority district, then the Chairmen would have said so explicitly—as they did when discussing CD1.

Moreover, the statement the district court relied upon is not materially different from a statement in *Cromartie II* that this Court found insufficient to support a finding that the legislature was motivated by race. There, the legislative redistricting leader assured a legislative committee that the proposed plan "provides for ... racial and partisan balance." 532 U.S. at 253. Although that statement plainly referred to the racial effects of the plan, the Court dismissed it as non-probative, reasoning that although "the phrase shows that the legislature considered race, along with other partisan and geographic considerations; ... it says little or nothing about whether race played a *predominant* role comparatively speaking." *Id.* Here, too, the mere fact that the Chairmen were aware that the plan was required to comply with—and believed that it did comply with—Section 5 does not even begin to suggest that race predominated over politics.

The district court made much the same mistake in placing weight on an excerpt from North Carolina's preclearance submission to DOJ in which the State explained that "the 2011 version [of CD12] maintains, and in fact increases, the African-American

community's ability to elect their candidate of choice in District 12." JS.App.33; *see* JA472. According to the court, "the submission supports race predominance in the creation of CD 12." JS.App.33. That conclusion is both contrary to this Court's cases and fundamentally unfair. To obtain preclearance from DOJ, North Carolina was *required* to affirm that its new districts complied with Section 5's nonretrogression principle. Turning that required affirmation by the State into evidence of the plan's unconstitutionality does exactly what this Court has held cannot be done: It traps a State "between the competing hazards of liability" under statutory and constitutional law. *Vera*, 517 U.S. at 977.

### 3. Appellees' flawed expert testimony had little, if any, probative value.

The district court also relied on testimony from Appellees' two experts, Doctors Ansolabehere and Peterson. JS.App.40-42. But neither expert was able to shed any light on the crucial question of whether "race *rather than* politics *predominantly* explains" CD12's boundaries. *Cromartie II*, 532 U.S. at 243. Indeed, just as in *Cromartie II*, it is difficult to see how this expert testimony "could have provided more than minimal support for the District Court's conclusion." *Id.* at 250.

To start with Dr. Ansolabehere, his testimony suffered from the precise defect that this Court exposed in *Cromartie II*. There, the district court based its "race, not politics" conclusion in part on maps showing that CD12 excluded several adjacent precincts "'with less than 35 percent African-American population' but which contain between 54% and 76%

*registered* Democrats." *Id.* at 244-45. According to the district court, exclusion of those precincts was inconsistent with a political motive because including them "would have established a far more compact district" while still serving political goals. *Id.* This Court rejected that finding because the underlying data focused on voter *registration* figures rather than on voting behavior. As the Court explained, "registration figures do not accurately predict preference at the polls" in North Carolina, as "white voters registered as Democrats 'cross-over' to vote for a Republican candidate more often than do African-Americans." *Id.* at 245. A legislature seeking to create a safe Democratic district thus "may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be political rather than racial." *Id.*

Yet, notwithstanding the fact that this case involves the very same district in the very same State, Dr. Ansolabehere inexplicably based *all* of his analysis and testimony on voter registration data alone. *See* JA2532. More remarkable still, he relied exclusively on voter registration data even though he *knew* this Court had disapproved of that data, JA2568-69, even though data of actual voting behavior were available to him, JA2562, and even though he used data of actual voting behavior when performing the same type of analysis in another recent redistricting case, JA2567-69.[9]

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[9] The other case is *Bethune-Hill v. Virginia State Board of Elections*, in which this Court has noted probable jurisdiction. 136 S. Ct. 2406 (2016). Although Dr. Ansolabehere used voter

The best explanation Dr. Ansolabehere could muster for all that was that "registration data was a pretty good indicator of voting behavior." JA2535. That is certainly true as a general matter, but no more so than it was in *Cromartie II*, where the Court nonetheless rejected party registration data as insufficiently correlative of voting practices in the particular geographic area at issue—the very same geographic area at issue here. Moreover, Dr. Ansolabehere's justification does not begin to explain why anyone would use registration data when actual voting behavior data is readily available. In the end, the only plausible explanation for his decision to use data that he knew this Court had deemed inferior is that the voting behavior data would have confirmed that the boundaries of CD12 correlate better with politics than with race.

Dr. Peterson's testimony was no better; indeed, the district court hardly mentioned it. JS.App.40-41. Dr. Peterson performed the same sort of "segment analysis" he performed in the *Cromartie* cases, splitting the district's border into 330 segments and comparing the racial and party demographics "between the inside precinct that touches the segment and the corresponding outside precinct." *Cromartie I*, 526 U.S. at 548 n.5; *see* JA2451-55. He measured race three different ways (total black population, black voting age population, and black registered voters),

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registration data in that case, the three-judge district court rejected his testimony because of additional flaws in his methodology—flaws that are also present here. *See Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 552 (E.D. Va. 2015).

measured party affiliation four different ways (voter registration, 2008 Gubernatorial election results, 2008 Presidential election results, and 2010 Senate election results), and performed a segment analysis for each, thus producing 12 comparisons. JA2453-57. Of those comparisons, six supported the hypothesis that race predominated, four supported the hypothesis that politics predominated, and two supported neither hypothesis. JS.App.41; JA2477-78. Thus, even accepting Dr. Peterson's methodology at face value, *half* of his studies were inconsistent with the hypothesis he sought to prove. *Cf. Cromartie I*, 526 U.S. at 549 (noting that Dr. Peterson's analysis showed that "the State included the more heavily Democratic precinct *much more often* than the more heavily black precinct" (emphasis added)).

That said, there is good reason to doubt Dr. Peterson's methodology. Although this Court credited other parts of his testimony in *Cromartie II*, it specifically noted that his "segment analysis did not account for differences in population between precincts," which could "affect[] the reliability" of his results. 532 U.S. at 251-52. Yet here, too, his analysis did not account for those differences. JA2487, 2745-46.[10] Moreover, most of the segments that produced results supporting one hypothesis or the other were located along the narrow portion of the district that tracks the I-85 corridor. JA2745-46. That portion of

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[10] For instance, in the one "unequivocal pair" of precincts that Dr. Peterson touted as supporting his race hypothesis across all 12 studies, JA2478, the black voting-age populations were just 3.74% and 1.82%. That one of these precincts was included in CD12 instead of the other is hardly significant.

the district, which is one precinct wide in most places, was designed solely to connect Democratic precincts in Mecklenburg County with Democratic precincts in Guilford and Forsyth Counties. *Id.* It was never expected or intended to be composed of highly Democratic precincts, so a segment analysis of that portion says nothing about whether the district as a whole is consistent with political objectives. And in all events, Dr. Peterson's "tiny calculated percentage differences" are "simply too small to carry significant evidentiary weight." *Cromartie II*, 532 U.S. at 247. Indeed, in the average comparison of the 330 segments, *over 96%* were equally consistent with the race and the partisan hypothesis. JA270. In short, Dr. Peterson used questionable methods to produce equivocal results, and the district court clearly erred to the extent it relied on his testimony.

#### 4. Congressman Watt's testimony has little probative value.

The district court also credited Congressman Watt's double-hearsay testimony that, in June of 2011, Senator Rucho "said to me that his leadership had told him that he had to ramp the minority percentage in my Congressional District up." JA2369. Senator Rucho denied making any such statement when he testified in the state court proceedings, JA1703, and Representative Samuelson—who was present during the exchange in question—confirmed that Senator Rucho did not "make any comments during this meeting about the potential racial composition of Congressman Watt's district," JA1698.

Even if Senator Rucho had made such a comment, however, by Congressman Watt's own account, he

convinced Senator Rucho that no such ameliorative action was necessary. According to Congressman Watt's testimony, he responded by assuring Senator Rucho that "the Voting Rights Act does not require" an increase in CD12's minority population. JA2369. Sure enough, when Senator Rucho introduced Rucho-Lewis Congress 1 to the legislature a few weeks later, he explained that he had "sought input from Congressman Watt regarding potential options for revising the Twelfth Congressional district," and that he had drawn CD12 not as a VRA district, but rather "with the intention of making it a very strong Democratic District." JA357. In all events, whatever Senator Rucho did or did not say to Congressman Watt could not have had any impact on how the district's lines were actually drawn, as Dr. Hofeller's undisputed testimony confirms that *he* did not "receive any instructions about the racial percentage to include in the 12th District." JA2686.

**5. Appellees failed to prove that CD12 does not comply with traditional districting principles.**

The district court also treated CD12's "serpentine" shape and low compactness score as "persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale." JS.App.35-36. But as Judge Osteen recognized in his dissenting opinion, CD12 "has *always* had a bizarre shape and low compactness scores." JS.App.85; *see also Shaw I*, 509 U.S. at 635-36. There was thus no conceivable way, short of scrapping the entire map and starting from scratch, that CD12 would emerge

with anything other than a serpentine shape and low compactness score. Indeed, CD12 is not materially different in shape and compactness from how it was in *Cromartie II*, and those features did not prevent this Court from concluding that the district lines were politically motivated.

Ultimately, Appellees' argument reduces to the notion that CD12 *must have* been based on racial considerations for the simple reason that Dr. Hofeller's methodology produced a (bare) majority-minority district. But that result is readily explained by the fact that CD12's black voting-age population *already* comprised nearly 44% of its total voting-age population. As "racial identification correlates highly with political affiliation," it is wholly unremarkable that "placing reliable Democratic precincts within [CD12] without regard to race" would result in the "district containing more heavily African-American precincts." *Cromartie II*, 532 U.S. at 258, 245. If incidental increases in black voting-age population that result from the inclusion of heavily Democratic precincts are enough to violate the Constitution, then legislatures pursuing political objectives will be *required* to consciously work to add only *majority-white* districts, which itself would violate the Equal Protection Clause. That cannot possibly be the law.

* * *

The district court's finding that race predominated in drawing CD12 is impossible to reconcile with *Cromartie II*. Just as in that case, the plaintiffs' evidence does not come close to satisfying their "demanding" burden to prove that "race *rather than* politics *predominantly* explains [a] District['s]

boundaries." *Cromartie II*, 532 U.S. at 243. Appellees did absolutely nothing to refute Dr. Hofeller's uncontradicted testimony that he drew CD12 based solely on the results of the 2008 Presidential election, and the mere fact that doing so had the byproduct of marginally increasing the black voting-age population to just above 50% is manifestly insufficient to sustain a racial gerrymandering claim. Accordingly, with respect to CD12, "there is no racial classification to justify." *Vera*, 517 U.S. at 968.

## III. Congressional District 1 Is Not The Product Of An Impermissible Racial Gerrymander.

Unlike with CD12, the General Assembly intentionally established CD1 as a majority-minority district, raising its black voting-age population by four percentage points, from 48.63% to 52.65%. That alone, however, does not suffice to establish that race predominated in the drawing of CD1, and the district court's contrary conclusion was error. But even if strict scrutiny properly applied, it would be readily satisfied, as the General Assembly plainly had both "good reasons" and a "substantial basis in evidence" for concluding that it needed to maintain CD1 as a majority-minority district to comply with the VRA.

### A. Appellees Failed to Meet Their Demanding Burden of Proving that Race Predominated In the Drawing of CD1.

To ensure compliance with the VRA, the General Assembly drew CD1 as a majority-minority district, raising its percentage of black voting-age population from 48.63% to 52.65%. That much is undisputed. But the district court treated this bare fact—*i.e.*, that the state intentionally created a majority-minority

district—as sufficient to trigger strict scrutiny. That is not the law, and indeed, *could* not be the law without raising grave doubts about the constitutionality of Section 2 as interpreted by the Court. *See, e.g.*, *Vera*, 517 U.S. at 958. After all, "[u]nder present doctrine, §2 can *require* the creation of these districts." *Strickland*, 556 U.S. at 13 (emphasis added). States cannot be presumed to violate the Constitution by undertaking a good-faith effort to do what federal law compels them to do. Congressional redistricting can be contentious and politically controversial, but it should not impossible to undertake without inviting litigation under the VRA or the Equal Protection Clause.

Instead, the proper standard has always reserved strict scrutiny for cases where the plaintiffs prove not just that the legislature considered race in drawing its district lines, but also that the legislature actually "subordinated traditional race-neutral districting principles ... to racial considerations." *Miller*, 515 U.S. at 916. By definition, race-neutral principles have not been "subordinated" unless there is an actual conflict between those principles and the lines the legislature drew. Absent such conflict, plaintiffs cannot prove the "racially discriminatory impact" that is required to violate the Equal Protection Clause. *Hunter v. Underwood*, 471 U.S. 222, 232 (1985). Accordingly, a plaintiff must prove—and a court must find—that the challenged district lines are inconsistent with traditional districting principles.

The district court made no such finding here. The court did not and could not claim that CD1 is "so extremely irregular on its face that it rationally can be

viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles." *Shaw I*, 509 U.S. at 642. In fact, the court did not identify a single district line that departed from traditional principles. *Cf. ALBC*, 135 S. Ct. at 1271 ("[T]he drafters split seven precincts between the majority-black District 26 and the majority-white District 25, with the population in those precincts clearly divided on racial lines."); *Vera*, 517 U.S. at 975 (noting "the intricacy of the lines drawn, separating Hispanic voters from African-American voters on a block-by-block basis"). Nor, as with CD12, did Appellees offer an alternative map that might have better hewed to traditional principles while still avoiding the legislature's VRA liability concerns. Instead, the district court relied on nothing more than the undisputed fact that the State deliberately drew CD1 as a majority-minority district.

For instance, the court cited Dr. Hofeller's testimony that he was instructed to "draw District 1 with a black VAP level of 50 percent or more" as "strong" evidence that the legislature "prioritized" race above all other criteria. JS.App.23, 26. But of course the legislature's first priority was to comply with the law. The question is not whether race ranked higher on some list of criteria, but rather whether race "had a direct and significant impact" that changed the district's final form. *ALBC*, 135 S. Ct. at 1271. And for all its lofty language about a racial "quota operat[ing] as a filter through which all line-drawing decisions had to pass," JS.App.29, the district court never identified a single line-drawing decision on which that purported "filter" had any impact, let alone a "direct and significant" one. The court's factual

findings—which do nothing more than confirm what Appellants readily admit—simply do not support its conclusion that Appellees satisfied their demanding burden of proving that race predominated over traditional districting principles.

### B. Drawing CD1 As a Majority-Minority District Was A Narrowly Tailored Effort to Achieve the State's Compelling Interest in Complying with the VRA.

Even assuming Appellees made a sufficient showing to trigger strict scrutiny, CD1 would still pass constitutional muster. The State plainly demonstrated that it had good reasons to conclude that drawing CD1 as a majority-minority district was necessary to achieve its compelling interest in complying the VRA. The district court concluded otherwise only by holding the State to a burden far more demanding than this Court's precedents permit.

#### 1. States are entitled to leeway in pursuing their compelling interest in complying with the VRA.

When strict scrutiny applies to districting legislation, a State must prove that its use of race was "narrowly tailored to serve a compelling state interest." *Shaw II*, 517 U.S. at 902. Although this Court has not yet squarely held that compliance with the VRA is a "compelling interest," eight Justices in *LULAC* agreed that States have a compelling interest in complying with Section 5, *see League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 475 n.12, 485 n.2, 518 (2006), and this Court has assumed, on multiple occasions, that States have a compelling interest in complying with Section 2. *See,*

*e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 91 (1997); *Shaw II*, 517 U.S. at 915; *Vera*, 517 U.S. at 978. That longstanding assumption is plainly correct. Indeed, to hold that States do *not* have a compelling interest in complying with the VRA would be tantamount to holding the statute (at least as traditionally interpreted by this Court) unconstitutional.

To satisfy narrow tailoring, a State need not prove that its use of race in drawing a district was *necessary* to achieve compliance with the VRA. *See ALBC*, 135 S. Ct. at 1274. Instead, a State need show only that it had "good reasons," or a "strong basis in evidence," to believe that the VRA required it to consider race in the manner that it did—"even if a court does not find that the actions were necessary for statutory compliance." *Id.* That flexibility is essential to ensure that States are not caught "between the competing hazards of liability" under the VRA and the Constitution. *Vera*, 517 U.S. at 977. After all, "[t]he law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) [a violation of the VRA] should the legislature place a few too few." *ALBC*, 135 S. Ct. at 1273-74. Accordingly, "the importance in our federal system of each State's sovereign interest in implementing its redistricting plan" necessarily demands some "deference ... to States' reasonable fears of ... Section 2 liability." Br. for United States 32, *ALBC*, 135 S. Ct. 1257.

Indeed, if States were not entitled to any play in the joints when determining whether the VRA requires the use of race in drawing district lines, then

they would have no choice but to make exceedingly detailed—yet ultimately speculative—predictions about future demographic patterns and voting behavior before they could even begin the process of drawing new district lines. Moreover, "[f]orbidding [States] to act unless they know, with certainty, that a practice violates the [VRA] would bring compliance efforts to a near standstill," *Ricci v. DeStefano*, 557 U.S. 557, 581 (2009), thereby undermining the very purposes the VRA is intended to further.

The "leeway" to which States are entitled when they are engaged in good-faith efforts to comply with the VRA applies with full force when it comes to determining whether and how to draw a majority-minority district. *Vera*, 517 U.S. at 977. States need not prove that a majority-minority district was absolutely necessary in order to justify drawing one. Nor need they "determine *precisely* what percent minority population" would best enable to minorities to elect their candidate of choice when drawing a district to address vote dilution concerns. *ALBC*, 135 S. Ct. at 1273. "If the State has 'a strong basis in evidence' for concluding that creation of a majority-minority district is reasonably necessary to comply with §2, and the districting that is based on race 'substantially addresses the §2 violation,' it satisfies strict scrutiny." *Vera*, 517 U.S. at 977 (citations omitted). And a State necessarily "substantially addresses" that kind of Section 2 violation when it draws such a district to ensure that the minority group has a numerical majority.

That conclusion follows directly from this Court's decision in *Strickland*. There, the State argued that

Section 2 required it to violate state-law districting criteria in order to create a so-called "crossover district"—*i.e.*, a district in which a minority group that did not constitute a numerical majority would consistently be able to recruit enough majority voters to support its preferred candidate. *Strickland*, 556 U.S. at 7. This Court rejected the premise of that argument—*i.e.*, that Section 2 compelled the creation of such a crossover district—and instead held that the only type of majority-minority district that Section 2 "requires" is one in which "a minority group composes a numerical, working majority of the voting-age population." *Id.* at 13. That is precisely the kind of district at issue here. And if, as here, the State has "'a strong basis in evidence' for concluding that creation of a majority-minority district is reasonably necessary to comply with §2," *Vera*, 517 U.S. at 977, then it, by definition, has a strong basis in evidence for drawing the district to ensure that "a minority group composes a numerical, working majority of the voting-age population." *Strickland*, 556 U.S. at 13.

Basic principles of federalism reinforce that result, as the law must "provide[] straightforward guidance to ... officials charged with drawing district lines." *Id.* at 18. Moreover, requiring States to determine *precisely* what percentage of the population a minority group that satisfies the *Gingles* factors needs to elect its candidate of choice would "place courts in the untenable position of predicting many political variables and tying them to race-based assumptions." *Id.* at 17. The inquiry would demand "elusive" answers to "speculative" questions, such as:

> How reliable would the crossover votes be in future elections? What types of candidates have white and minority voters supported together in the past and will those trends continue? Were past crossover votes based on incumbency and did that depend on race? What are the historical turnout rates among white and minority voters and will they stay the same?

*Id.* "A requirement to draw election districts on answers to these and like inquiries"—inquiries that all but guarantee second-guessing and resource-consuming litigation, and on which "even experienced polling analysts and political experts could not" agree—"ought not to be inferred from the text or purpose of §2." *Id.*

In short, requiring States to "get things just right" in determining what either section of the VRA requires would place States in an "impossible bind." Br. for United States 32, *ALBC*, 135 S. Ct. 1257. States cannot realistically be expected "to strike precisely the balance that a court would ultimately strike years later in balancing 'not always harmonious' constitutional and statutory mandates—with the certainty of a constitutional or statutory violation if they guessed wrong." *Id.* Instead, so long as a State is adhering to correct legal principles, what is required is good faith. It is enough that a State had "good reasons," with "a strong basis in evidence," to make "the (race-based) choice that it" made. *ALBC*, 135 S. Ct. at 1274.

### 2. The General Assembly plainly had good reasons to believe Section 2 required drawing CD1 as a majority-minority district.

The General Assembly had exceedingly "good reasons" to believe it needed to draw CD1 as a majority-minority district to avoid Section 2 liability.[11] The three preconditions to a Section 2 claim are: (1) the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group is "politically cohesive"; and (3) the white majority votes "as a bloc." *Gingles*, 478 U.S. at 50-51. These latter two requirements are often discussed in tandem, under the rubric of "racially polarized voting." *See, e.g.*, *LULAC*, 548 U.S. at 427. When minority voters cohesively vote one way and white voters cohesively vote the other way, the white voters may be able to consistently "defeat the minority's preferred candidates." *Gingles*, 478 U.S. at 56.

There is no question that the first factor was satisfied here, as CD1 has been a majority-minority district in the past, and by 2011, the benchmark version of CD1 had a black voting-age population of 48.63% and a black registered-voter percentage of 50.66%. JA868, 873. As to the remaining two factors, the legislature had ample evidence of racially polarized voting when it decided to once again draw

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[11] For largely the same reasons, the legislature also had "good reasons" to believe it needed to draw CD1 as a majority-minority district to avoid liability under Section 5, as failing to preserve the ability of African-American voters to elect their candidate of choice would have exposed the State to a retrogression charge.

CD1 as a majority-minority district. First, a federal court had upheld a previous decision to draw this very district as a majority-minority district as a narrowly tailored remedy to a potential Section 2 violation, and in doing so found that CD1 satisfied all three *Gingles* preconditions. *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 422 (E.D.N.C. 2000), *rev'd on other grounds sub nom. Easley v. Cromartie*, 532 U.S. 234 (2001). Absent some dramatic change in circumstances, that fact alone would seem to provide a clear, objective, good-faith basis for fearing a potential Section 2 violation.

But that fact hardly stood alone. Every single piece of evidence the legislature collected before enacting the 2011 Congressional Plan, which is clearly the relevant time frame, confirmed that racially polarized voting still existed. That evidence included two expert reports—one commissioned by SCSJ and one commissioned by the General Assembly itself—that found consistently high levels of racially polarized voting. The report of Dr. Block, the SCSJ's expert, examined election results for 54 congressional and legislative elections between a white candidate and a black candidate in 2006, 2008, and 2010—including a federal election in CD1 and multiple state-level elections in areas encompassed by CD1. JA956. And his study concluded that "non-blacks consistently vote against African American candidates and that blacks demonstrate high rates of racial bloc voting in favor of co-ethnic candidates." JA956. Dr. Block also found a "consistent relationship between the race of a voter and the way in which s/he votes." JA960. His data plainly "demonstrate[d] the continued need for majority-minority districts." JA886.

The General Assembly's own expert, Dr. Brunell, reviewed and agreed with Dr. Block's findings. JA972-73. Dr. Brunell also conducted his own analysis, focusing on polarization at the county level. JA973. Using data provided by the state board of elections, he analyzed the results of several federal, state, and local elections, including the 2008 Democratic Presidential primary, the 2008 Presidential election, and the 2004 General Election for State Auditor (the only statewide partisan election between a black and a white candidate). JA975-1002, 1961-68. His study estimated both the proportion of black voters that can be expected to favor the black candidate and the proportion of white voters that can be expected to favor the white candidate. Dr. Brunell found "statistically significant racially polarized voting in 50 of the 51 counties" he studied, including *every single county* in CD1. JA973, 1961-68. And, as the *Dickson* court noted, not a single "legislator, witness, or expert question[ed] the findings by Dr. Block or Dr. Brunell." JA2065.

The legislature also heard testimony from dozens of community members, all of whom corroborated the expert reports. JA2066-71; *cf. Gingles*, 478 U.S. at 52 (noting that district court relied in part on lay-witness testimony in assessing polarized voting). Although not all of this testimony was specific to CD1, a good deal was, and the rest certainly gave the legislature no reason to doubt the CD1-specific evidence.

For instance, a member of the Rocky Mount City Council and president of the local branch of the NAACP testified about the historical exclusion of African-Americans from the electoral process and

stated that negative attitudes toward African-Americans and polarized voting persist in Rocky Mount, which is located in CD1. JA2067. A resident of Pitt County, which borders CD1 and conceivably could have been drawn into it, testified that African-Americans had been unsuccessful in elections in the county. JA2069. Residents of Halifax, Pasquotank, and Durham Counties—all also in CD1—also shared their belief that majority-minority districts remained necessary. JA2067-69. Indeed, as the *Dickson* court emphasized, *not a single witness* testified that North Carolina's long and established history of racial polarization had vanished either statewide or in the state-level districts that the General Assembly had long treated as majority-minority districts. JA2066.

Perhaps the best source as to whether racially polarized voting continues in CD1 is Congressman Butterfield, who has represented CD1 since 2004. Butterfield testified during trial that in his district, "66 percent of white voters, in my opinion, will *never* vote for an African-American candidate for most positions." JA2417 (emphasis added). He characterized the level of polarized voting in Eastern North Carolina (where CD1 is located) as "severe," JA2418, and he lamented that "the coalition politics of Mecklenburg and Wake County unfortunately don't exist in Northeastern North Carolina," JA2441. Thus, even the candidate who was seeking reelection in CD1 readily conceded that voting in his district regrettably remains very racially polarized.

### 3. The district court clearly erred in finding Appellants' evidence of polarized voting insufficient.

Notwithstanding this wealth of evidence, the district court concluded that the State failed to satisfy strict scrutiny. The court did not reach that conclusion by reasoning that the General Assembly misapprehended the relevant *legal* requirements. *See, e.g., Miller*, 515 U.S. at 921; *Shaw II*, 517 U.S. at 911, 916-17; *Strickland*, 556 U.S. at 23. Instead, the court took issue only with the legislature's assessment of the *facts* before it, criticizing the evidence of racially polarized voting as too "generalized" and insufficiently "particularized" to CD1. JS.App.49. That conclusion is inexplicable. As just detailed, the legislature received uncontradicted evidence confirming that *every single county in CD1* has racially polarized voting. That evidence would have sufficed to prove that racially polarized *actually exists* in CD1; *a fortiori*, it plainly sufficed to prove that the legislature had a "strong basis" for reaching that conclusion. *ALBC*, 135 S. Ct. at 1274. Indeed, even Appellees have never seriously disputed that CD1 and its surrounding areas have racially polarized voting.

The district court alternatively faulted the State for failing to prove "that the white majority was *actually* voting as a bloc to defeat the minority's preferred candidates" "under earlier versions of CD 1." JS.App.50. That is doubly erroneous. First, the benchmark version of CD1 did not have a "white majority"; it had a 48.63% black voting-age population (and a 50.66% black registered voters population) coupled with a 7.58% voting-age population that

identified as neither white nor black, including 4.15% that identified as Hispanic. JA1154. CD1 thus was not the "majority-majority" district that the district court suggested. Moreover, the relevant question is not whether *earlier versions* of CD1 were consistent with the VRA; it is whether the State had good reasons for believing that drawing CD1 as a majority-minority district was necessary to avoid *future* VRA liability. Indeed, if all that mattered were past election results in the old district, States could never constitutionally create a majority-minority district unless the prior version of that district had *already* suffered from vote dilution. Any State that proactively created a majority-minority district to prevent an influx of new voters and shifting demographics from leading to vote dilution would automatically flunk strict scrutiny. *But see Perry v. Perez*, 132 S. Ct. 934, 941 (2012) ("In areas where population shifts are so large that no semblance of the existing plan's district lines can be used, [a previous] plan offers little guidance.").

The right question for the legislature, then, was: If CD1 were adjusted to satisfy "one-person, one-vote" on an entirely race-neutral basis, could the resulting district violate the VRA? The answer was plainly yes. Chairmen Rucho and Lewis were confronted with a CD1 that was underpopulated by more than 97,500 people, meaning they would need to reach into multiple surrounding counties to satisfy one-person, one-vote. JA2690. And every single county bordering CD1 was majority-white, so blindly adding new precincts to CD1 could have dramatically shifted its racial makeup.

That would have been particularly problematic because the preferred candidate of African-American voters in CD1 had just won re-election by the smallest margin of his political career, JA2416, prevailing by only 33,000 votes, JA378, despite outspending his opponent by almost 600%, JA2213. And that was with a black voting-age population of 48.63% and a black registered-voter percentage of 50.66%. Looking at just one potentially relevant data point, the Republican candidate in neighboring CD3 won by a whopping 72-25 margin in 2010.[12] Adding only *those* voters to CD1 easily could have tipped the balance—especially given the wealth of evidence that racially polarized voting was prevalent in both CD1 and its surrounding areas.

If all of that were not enough to give a legislature "good reasons" to draw a majority-minority district, then States would be left in precisely the bind that *Strickland* and *ALBC* sought to avoid. Indeed, under the district court's view of the law, the legislature would have been forced to evaluate the various forms CD1 could take if drawn on a wholly race-neutral basis; the way voters in each of those configurations might choose among candidates over the next decade; whether the downward trend in Congressman Butterfield's election results was likely to continue; how much of his past support from white voters was attributable to his "unique ... political advantages," JA2441, and how much of it would transfer to future candidates; whether turnout rates would remain constant; and on and on.

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[12] Official Results, North Carolina State Board of Elections, http://bit.ly/2co3cmT (last visited Sept. 11, 2016).

All the same inquiries would be necessary, moreover, "for election districts required by state or local law," forcing legislatures to expend countless resources making predictions that "would be speculative at best given that, especially in the context of local elections, voters' personal affiliations with candidates and views on particular issues can play a large role." *Strickland*, 556 U.S. at 18. And all of these predictions would be based on myriad race-based assumptions, thus forcing legislatures to do exactly what the VRA was designed to discourage and what the Constitution forbids. Such an utterly impractical—and constitutionally suspect—result "ought not to be inferred from the text or purpose of §2." *Id.* at 17.

* * *

The ultimate inquiry here—as in all cases under the Equal Protection Clause—must remain focused on the State's motive. The "predominant factor" test and the "good reasons" test both drive at the basic question of whether the legislature used politics as a pretext for intentionally discriminating against a minority group. The test is not designed to ensnare legislatures that did their level best to comply with competing statutory and constitutional commands, only to misjudge matters by a few percentage points. And yet the court below found a constitutional violation even though all three judges affirmatively had a felt-need to expressly disclaim any suggestion that the General Assembly acted in bad faith. *See* JS.App.4, 62. That disclaimer should have been a signal that the district court applied the wrong test, and that it demanded far more from the General Assembly than the law requires.

When a State engages in the core sovereign task of drawing the districts that will govern its elections, and it makes a good-faith effort to comply with federal law, federal courts should not stand in judgment years later just because they believe the State may have been a bit overcautious in trying to abide by its obligation to protect the ability of a minority group to elect its candidate of choice.

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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# STATUTORY APPENDIX

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## U.S. Const. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a

member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## Relevant Statutory Provisions Involved

### 52 U.S.C. §10301

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

### 52 U.S.C. §10304

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the first sentence of section 10303(b) of this title

are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the second sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the third sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if

the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred

candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.